

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs June 18, 2008

STATE OF TENNESSEE v. OMAR THERON DAVIS

**Direct Appeal from the Circuit Court for Montgomery County
No. 40500164 John H. Gasaway, III, Judge**

No. M2007-02206-CCA-R3-CD - Filed December 16, 2008

A Montgomery County Circuit Court jury convicted the appellant, Omar Theron Davis, of three counts of aggravated rape, especially aggravated kidnapping, aggravated robbery, aggravated burglary, and theft greater than five hundred dollars but less than one thousand dollars. The trial court sentenced him to twenty years for each aggravated rape conviction, twenty years for the especially aggravated kidnapping conviction, ten years for the aggravated robbery conviction, five years for the aggravated burglary conviction, and one year for the theft conviction. The trial court ordered that the sentences for aggravated rape be served consecutively and that the remaining sentences be served concurrently with one of the sentences imposed for aggravated rape, for an effective sentence of sixty years. On appeal, the appellant challenges the sufficiency of the evidence and the sentences he received. Upon review of the record and the parties' briefs, we affirm the appellant's convictions but modify his sentences for aggravated robbery and aggravated burglary. We affirm the judgments of the trial court in all other respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court are Affirmed as Modified.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Roger E. Nell (on appeal) and Collier W. Goodlett (at trial), Clarksville, Tennessee, for the appellant, Omar Theron Davis.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; John Wesley Carney, Jr., District Attorney General; and Art Bieber, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The appellant was originally charged as a juvenile but was transferred to circuit court to be tried as an adult. At trial, K.G.¹ testified that she was home alone at approximately 7:00 a.m. on November 8, 2004, when her doorbell rang. When she opened the door, a man wearing a ski mask, a dark jacket with a hood, and black gloves barged into the house. He was carrying a handgun. She tried to leave, but the man slammed her into a wall, knocking her down. He then tied her hands behind her back. She said that she cried and pleaded with him to stop and that he held the gun to her head and told her to shut up. He removed her pants, pantyhose, and underpants and grabbed her arms, forcing her to the bedroom with the gun against her back. Once in the bedroom, he tied a sweater around her head so that she could not see anything. She said that she heard him getting undressed and that he raped her vaginally in several different positions. Afterward, he forced her into the kitchen where he used one of her kitchen knives to cut off her blouse and bra. He then took her into the bathroom where he fondled her and replaced the sweater that was covering her face with a bandana and something else over her eyes.

K.G. testified that the appellant forced her into the shower with him and washed her. She said that he dried her off and forced her back into the bedroom where he lifted her onto the bed and performed cunnilingus. He then held the gun to her head and forced her to perform fellatio. He raped her again vaginally. During the attack, he mentioned K.G.'s daughter and told K.G. that she "had better cooperate." K.G. said that the bandana loosened so that she was able to see the appellant's face clearly. The attack ended when K.G. told the appellant that she could not keep up anymore and pretended to pass out.

K.G. said that she heard the appellant ransacking her bedroom after the attack and that the appellant found a loaded gun that she kept in the drawer of her night stand. She said the appellant put the gun to her head and asked if she had any more guns in the house. She told him about a broken rifle that was in the closet. He then asked her whether she had more bullets. She denied having more bullets, although there were some in one of her drawers. The appellant continued to rifle through the house until he found her purse. He lifted the bandana from her eyes to ask her about her two credit cards and her car key. She gave him the "PIN number" for one of the credit cards and confirmed that the key he found belonged to her car. He placed the bandana back over her eyes, and she heard the sound of zippers as though he were placing items in a backpack. Before the appellant left the house, he forced the victim onto her stomach and tied her wrists and ankles together behind her.

K.G. freed herself and called 9-1-1 a little after 8:00 a.m. When police arrived, she told them what had happened and that her car was missing. She was afraid that her daughter was in danger and insisted that the police send someone to Kenwood High School to get her daughter. Later that day, police showed K.G. a Kenwood High School yearbook, and she identified the appellant as her attacker.

¹It is the policy of this court to refer to victims of sexual offenses by their initials.

The parties stipulated that the appellant arrived at Kenwood High School at 8:47 a.m. on November 8, 2004. Hal Bedell, the school principal, testified that the appellant signed in late that day. Based on a telephone call he received from the Clarksville Police Department that morning, Bedell instructed the school security officer to search the school parking lot for the victim's car. The car was discovered in the student parking lot. At approximately 9:00 a.m., Bedell advised Detective Parrish of the Clarksville Police Department that the car had been found.

Detective Ronald T. Parrish testified that he went to the appellant's home around 6:00 p.m. on November 8, 2004, and searched the appellant's bedroom. He found a wet bandana and a backpack underneath the appellant's bed. Inside the backpack, he found items the victim had reported missing, including the gun from her night stand, one of her credit cards, her bra, her cellular telephone, two microcassette recorders, photographs, pens, and pencils. Detective Parrish also testified that the appellant was excluded as a contributor of DNA that was obtained from the victim's rape kit. The victim testified that she had intercourse with her fiancé during the weekend preceding the attack.

II. Analysis

A. Sufficiency of the Evidence

The appellant contends that the evidence is insufficient to support his convictions because the victim's identification of him is untrustworthy. He also cites the lack of fingerprint evidence and the fact that the only DNA evidence obtained excludes him as a source. The State argues that the evidence is sufficient. We agree with the State.

When an appellant challenges the sufficiency of the convicting evidence, the standard for review by an appellate court is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); Tenn. R. App. P. 13(e). The State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions concerning the credibility of witnesses and the weight and value to be afforded the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). This court will not reweigh or reevaluate the evidence, nor will this court substitute its inferences drawn from the circumstantial evidence for those inferences drawn by the jury. Id. Because a jury conviction removes the presumption of innocence with which a defendant is initially cloaked at trial and replaces it on appeal with one of guilt, a convicted defendant has the burden of demonstrating to this court that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

The only challenges the appellant makes regarding the sufficiency of the evidence are his assertions that the victim's identification of him is untrustworthy and that no fingerprint or DNA evidence links him to the crimes. However, the victim testified that she was able to get a clear look

at the appellant while he was attacking her. Furthermore, her car was discovered at Kenwood High School minutes after the appellant arrived at the school. Additionally, the wet bandana used to cover her eyes during the rapes and the items taken from her home were found under the appellant's bed. Despite the lack of fingerprint or DNA evidence, sufficient proof was presented at trial for a rational jury to conclude that the appellant was the person who intruded into the victim's home, raped her, robbed her, confined her at gunpoint, and took her car. Accordingly, we affirm the appellant's convictions.

B. Sentencing

The appellant claims that his sentences are excessive. He contends that the trial court improperly applied enhancement factors that were neither admitted nor found by the jury, a violation of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). Additionally, he challenges the applicability of Tennessee Code Annotated section 40-35-114(10) (2006) to his sentences for aggravated rape, especially aggravated kidnapping, aggravated robbery, and aggravated burglary, arguing that the high risk to human life is inherent in those offenses. He also contends that the trial court erred by failing to consider the voluntary release of the victim alive in mitigation of the sentence for especially aggravated kidnapping, see Tenn. Code Ann. § 39-13-305(b)(2), and that the trial court's imposition of consecutive sentences is unconstitutional under Blakely. The State concedes that the trial court improperly applied enhancement factors in violation of Blakely. However, the State argues that a remand for resentencing is unnecessary because Blakely does not apply to the trial court's decision to order consecutive sentences, and the trial court properly sentenced the appellant to consecutive twenty-year sentences for each of the aggravated rape convictions. We affirm the sentences for aggravated rape, especially aggravated kidnapping and theft and the trial court's ordering of consecutive sentencing, for an effective sentence of sixty years. However, in accordance with Blakely, we modify the appellant's sentences for aggravated robbery to eight years, and we modify the appellant's sentence for aggravated burglary to three years.

The presentence report and victim impact statement were the only evidence submitted at the appellant's sentencing hearing. The presentence report reflects that the appellant was sixteen years old at the time of the offenses and had no prior convictions. The victim impact statement reflects that the victim lives in fear and that the crimes have also impacted her family.

In a written order, the trial court noted that the range of punishment for the appellant's aggravated rape and especially aggravated kidnapping convictions, Class A felonies, is fifteen to twenty-five years; that the range of punishment for the aggravated robbery conviction, a Class B felony, is eight to twelve years; that the range for punishment for the aggravated burglary conviction, a Class C felony, is three to six years; and that the range of punishment for a Class E felony theft is one to two years. See Tenn. Code Ann. § 40-35-112(a). With regard to mitigation, the trial court found that the appellant's theft conduct neither caused nor threatened serious bodily injury and that no other mitigating factors applied to any of the appellant's other offenses. The court specifically rejected the appellant's contention that he lacked substantial judgment in committing the offenses because of his youth stating:

The court specifically rejects the defendant's contention that the defendant lacked substantial judgment in committing the offenses because of his youth. The defendant exercised substantial judgment in both the planning and implementation of the offenses. He assembled dark clothing, a gun and binding and went to the victim's house at a time when she was alone. He repeatedly raped her over more than an hour. He took the time to wash the victim in preparation for oral sex. He completed his plan by taking her car to make his escape.

As enhancement, the trial court found that Tennessee Code Annotated section 40-35-114(10) (2006) was applicable to the appellant's sentences for aggravated burglary, especially aggravated kidnapping, aggravated robbery, and aggravated rape because the appellant had no hesitation about committing those crimes when the risk to human life was high. The trial court further enhanced the aggravated burglary conviction based on its finding that the appellant allowed the victim to be treated with exceptional cruelty. See Tenn. Code Ann. § 40-35-114(5) (2006). After considering the applicable mitigating and enhancement factors, the trial court imposed sentences of twenty years for each aggravated rape conviction and the especially aggravated kidnapping conviction. The court sentenced the appellant to ten years for aggravated robbery, five years for aggravated burglary, and one year for the theft conviction.

The trial court ordered that the sentences for the aggravated rape convictions be served consecutively based on its finding that the appellant was a dangerous offender under Tennessee Code Annotated section 40-35-115(b)(4). Consistent with State v. Wilkerson, 905 S.W.2d 933 (Tenn. 1995), the court further found that the crimes involved aggravated criminal conduct; that consecutive sentences were a necessary means to protect the public from further criminal acts by the appellant; and that the sentences reasonably related to the severity of the offenses.

Appellate review of the length, range, or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the appellant in his own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210; see also State v. Ashby, 823 S.W. 2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentence. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the trial court's determinations a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169.

For offenses committed prior to June 7, 2005, sentencing was governed by prior law, which provided for "presumptive" sentences. The presumptive sentence was the midpoint in the range for

Class A felonies and the minimum in the range for all remaining felonies. See Tenn. Code Ann. § 40-35-210(c), (d) (2003). Trial courts then were to enhance and/or mitigate a defendant's sentence based upon the application of enhancement and mitigating factors. See Tenn. Code Ann. § 40-35-210(d), (e) (2003). In Blakely, the United States Supreme Court concluded that the "'statutory maximum' for Apprendi [v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000),] purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely, 542 U.S. at 303, 124 S. Ct. at 2537; see also Gomez v. Tennessee, ___ U.S. ___, 127 S. Ct. 1209 (2007). In response to Blakely, our legislature amended Tennessee's sentencing scheme and eliminated presumptive sentences. The Compiler's Notes to Tennessee Code Annotated section 40-35-210 (2006) provide that

for defendants who are sentenced after June 7, 2005, for offenses committed on or after July 1, 1982, the defendant may elect to be sentenced under the provisions of the act by executing a waiver of such defendant's ex post facto protections. Upon executing such a waiver, all provisions of the act shall apply to the defendant.

In the present case, the appellant committed the offenses in November 2004 and was sentenced in June 2006. Therefore, the trial court was required to sentence him under the prior sentencing law unless the appellant executed a written waiver of ex post facto protections. There is no waiver in the appellate record.

The appellant contends and the State concedes that the trial court erred by applying enhancement factors that were neither admitted by the appellant nor determined by a jury beyond a reasonable doubt. See Blakely, 542 U.S. at 303, 124 S. Ct. at 2537. Although the trial court stated that it was enhancing the appellant's sentences for aggravated rape and especially aggravated kidnapping based upon the finding that he had no hesitation about creating a high risk to human life, see Tenn. Code Ann. § 40-35-114(10) (2006), the court only sentenced the appellant to the presumptive sentences for those convictions. Therefore, the appellant is not entitled to relief with respect to the length of the aggravated rape sentences. However, in accordance with Blakely, we modify the appellant's sentences for aggravated robbery and aggravated burglary to the presumptive sentences of eight years and three years, respectively.

With respect to his sentence for especially aggravated kidnapping, the appellant contends that the trial court erred by failing to consider his voluntary release of the victim alive as a mitigating factor. We agree with the appellant that Tennessee Code Annotated section 39-13-305(b)(2) mandates that the voluntary release of a victim be considered in mitigation of a sentence for especially aggravated kidnapping. However, in this case, the appellant did not release the victim but rather left her hog-tied face down on her bed with her wrists and ankles tied behind her. Leaving the victim bound does not equate to voluntarily releasing the victim within the meaning of the statute. See State v. Taylor, 63 S.W.3d 400, 412 (Tenn. Crim. App. 2001) (holding that mitigating factor does not apply when victim escaped). Accordingly, we affirm the presumptive sentence of twenty-years the trial court imposed for especially aggravated kidnapping.

Finally, the appellant contends that the trial court's imposition of consecutive sentences violates Blakely. He does not challenge the trial court's findings of fact but rather the trial court's authority to make the findings necessary to impose consecutive sentence. See Oregon v. Ice, ___ U.S. ___, 128 S. Ct. 1657 (2008) (granting certiorari to decide "[w]hether the Sixth Amendment, as construed in Apprendi . . . and Blakely . . . requires that facts (other than prior convictions) necessary to imposing consecutive sentences be found by the jury or admitted by the defendant"). The Tennessee Supreme Court rejected the same argument in State v. Allen, 259 S.W.3d 671 (Tenn. 2008). Noting that the "decision . . . to impose consecutive sentences for multiple crimes is a decision about the manner in which a defendant serves his or her multiple punishments," the court held that "Apprendi and Blakely simply do not require the jury to determine the manner in which a defendant serves multiple sentences." Allen, 259 S.W.3d at 689-90. The rationale of Blakely is inapplicable to the trial court's ordering of consecutive sentences; therefore, the appellant is not entitled to relief on this issue.

III. Conclusion

Based upon the foregoing, we affirm the appellant's convictions; his sentences for the aggravated rapes, especially aggravated kidnapping, and theft; and the trial court's order of consecutive sentencing. However, we modify the appellant's sentence for aggravated robbery to eight years and his sentence for aggravated burglary to 3 years.

NORMA McGEE OGLE, JUDGE